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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 949.

WOODROW WILSON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

STEWART & BRUNTRAGER,
721 Olive Street,
St. Louis, Missouri 63101,
Attorneys for Petitioner.

Of Counsel:
HAROLD GRUENBERG,
721 Olive Street,
St. Louis, Missouri 63101.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Courts of Appeals for the Eighth Circuit, entered in this cause on November 15, 1965.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 15, 1965. A timely motion for rehearing was overruled on December 30, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

I.

Where the relevancy of the document is dependent upon its date, is it admissible even though an unexplained ambiguity exists as to the date?

STATUTES INVOLVED.

28 U. S. C., Section 1732: Record made in regular course of business; photographic copies.

"(A) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by

the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in the section, includes business profession, occupation, and calling of every kind."

STATEMENT.

Woodrow Wilson was the president and business agent of International Hodcarriers, Building and Common Laborers Union of America, Local 916, hereafter sometimes called the Union (R. 2, 214). By indictment it was charged that Mr. Wilson had falsely testified under oath when he was called as a witness for the union before a trial examiner of the National Labor Relations Board (R. 319-323) in violation of Title 18, Section 1621, U. S. C. Thus the Federal Courts had original jurisdiction in this cause. Appellant was convicted upon a trial of the cause before a jury (R. 330). He was sentenced to a term of thirty months (R. 333).

The indictment, among other things, accused defendant of lying when he testified that he was at a construction project known as the Taum Sauk project at 8:10 to 8:30 A. M. on the morning of May 9, 1962.

In May of 1962, Owen Langston was clearing right of way for a power line under contract with Irby Construction Company near Ellington, Missouri (R. 129, 130).

Mr. Langston brought a crew of non-union men from Arkansas and hired some men in the Ellington area to work for him (R. 131, 146). Mr. Wilson was attempting to organize these crews (R. 215).

On May 9, 1962 around 7:00 to 7:30 o'clock A. M. there was a gathering of estimated 100 men and about 20 to 25 automobiles at a roadside park on the east side highway

21, a few miles north of Ellington, Missouri (R. 90, 135). It was estimated that the length of the park as it runs along the highway was between 500 to 900 feet (R. 152, 191). The park has an entrance at the southern end and the park proper sets about 25 to 30 feet above the road and there are trees in the park (R. 206, 208). At about 8:00 o'clock that morning there was a gathering of men and automobiles at what has been referred to as the Allen Farm (R. 139, 140, 185, 201, 202).

As a result of incidents alleged to have occurred on that day a complaint, Exhibit No. 1, was filed against the union upon the charge of Owen Langston (R. 3, 4).

At the hearing upon the complaint Woodrow Wilson was called as a witness on behalf of the union and was duly sworn upon his oath and testified before the trial examiner (R. 2, 3).

He testified that on May 9, 1962 he and Mr. Keeble went to a wayside park and picked up some authorization cards from Mr. Larkin between 6:00 and 6:30 o'clock A. M. (R. 7, 8). After he got the cards he talked for a few minutes with Mr. Larkin and at about 6:30 o'clock he left for the Taum Sauk Project (R. 8). He arrived at the Taum Sauk Project at around 8:00-8:15 o'clock. Taum Sauk is about fifty miles from Ellington (R. 9). He had never been to the Allen Farm and did not know where it was located (R. 10). He got to Taum Sauk between 8:00 and 8:30 o'clock in the morning (R. 12).

The government in support of its case produced Freddie Pyrtle who had been convicted of breaking into a house and stealing and was on probation at the time of trial (R. 94). He had also been convicted of destruction of government property (R. 97).

In May of 1962 he was employed by Owen Langston at Ellington (R. 80). He met Wilson while he was working

there and worked for Wilson carrying a picket sign (R. 81-83). He saw Mr. Wilson at the wayside park, on May 9, 1962 (R. 8, 88). There were about 100 men there, none of whom he recognized except Mr. Keeble and Harold Larkin. He did not speak to Wilson who was about thirty or fifty feet from him (R. 89-91).

He then went to the Allen Farm (R. 92). He did not see Mr. Wilson at the Allen Farm (R. 109). He then went back to the roadside park where he saw Mr. Wilson but did not talk to him (R. 93, 94).

At the N. L. R. B. hearing he testified that he did not see Mr. Wilson, Mr. Keeble or Mr. Larkin on May 9, 1962 (R. 108, 109).

The government also produced Owen Langston, the contractor who had made the unfair labor charge against the union. Mr. Langston had been convicted of making intoxicating whiskey and at the time he testified he had a civil suit pending against Mr. Wilson, Mr. Keeble and Mr. Larkin, in which he alleged he suffered damages arising out of incidents occurring on May 9, 1962 (R. 167-169).

On May 9 he was sitting in a car driven by Mr. Utley. They were following behind a large number of automobiles (R. 135, 150).

As they approached the roadside park they had to slow to about 10 to 15 miles per hour as the cars ahead of them turned into the entrance which is at the southern end of the park (R. 136, 150). They increased their speed as they proceeded north from the entrance to the park. There were 20 to 23 cars in the park and about 30 to 40 men (R. 138). After traveling about 300 to 400 feet they had attained a speed of about 20 miles per hour (R. 152). He then saw Mr. Keeble, Mr. Larkin and Mr. Wilson. However in passing he didn't see Mr. Wilson well enough to swear that it was Mr. Wilson that he saw (R. 157).

After traveling up the road a few miles (R. 138). By that time the men and cars were gone (R. 139). They then drove down to the Allen Farm which is south of the park and west of Highway 21 on a log road (R. 140). He saw Mr. Wilson, Mr. Keeble and Mr. Larkin on the edge of the wood in a little field to his left (R. 140).

The government also produced Lester Utley, an employee of Southern Engineering (R. 175). His job was to supervise the contractor, Owen Langston, in clearing the right of way (R. 176). He had seen Mr. Wilson on only three occasions before May 9, 1962 (R. 177-179). He was driving the automobile in which Mr. Langston was riding that morning (R. 182). As the cars ahead of him turned into the park he slowed to 10 to 15 miles per hour (R. 193). He then proceeded northwardly and within four or five hundred feet had increased his speed by about 10 to 15 miles per hour when his attention was called to "them union men" by Mr. Langston (R. 192, 193). He was entering a curve to the left and saw Mr. Wilson, Mr. Keeble and Mr. Larkin in the park among thirty scattered trees. These men were about 8 or 9 cars from the north end of the park (R. 182, 183).

After going north on the highway about three miles they turned around and drove to the Allen Farm (R. 184). He saw about 20 or 30 cars out there and as they drove along a rough log road he saw Mr. Wilson, Mr. Keeble and Mr. Larkin standing in a little parking area off to the left (R. 185, 201, 202). He had previously given a statement in which he said that these men were seated in a car (R. 202).

Woodrow Wilson, appellant here, testified on his own behalf (R. 124). On May 9, 1962, he met with Harold Larkin at the roadside park at Ellington, Missouri, at about 6:00 o'clock to 6:30 o'clock in the morning and picked up five authorization cards (R. 124). They met

near the center of the park. He was there for about fifteen or twenty minutes and then he left for the Taum Sauk project. While he was at the park there were no cars there aside from his car and the car of Mr. Larkin (R. 217). Mr. Keeble was with him on the trip (R. 219).

When he got to the Taum Sauk they went in the main gate to the office of Mr. Tinker, who was in charge of the operating engineers. He got there about 8:10 to 8:15 o'clock (R. 219-220). They had a discussion with respect to discharging a laborer (R. 220).

They then went up by the reservoir about 8:30 o'clock A. M., or a little later where he saw Mr. Louis Hawkins (R. 221). They were there about thirty minutes. He then went about the project visiting with the men in his union. They left the project at about 10:00 or 10:30 o'clock (R. 222). He was never at the Allen Farm and didn't know where it was except from hearing of its general location (R. 223).

Bill G. Tinker and Louie Hawkins corroborated the testimony of Mr. Wilson (R. 242-246, 254, 255, 257, 258).

In support of its allegation that defendant had not testified truthfully when he asserted that he was at Taum Sauk at 8:00 to 8:30 o'clock on May 9, 1962, the Government offered Exhibit "3", which was admitted into evidence over defendant's objection (R. 50).

In order to qualify the exhibit the government called John E. Barker, the Office Manager at the Taum Sauk Project. He identified Exhibit "3" as being a visitors' log that was kept at the main gate (R. 22).

He testifies that such logs were kept in the usual course of business and that they were made simultaneously with the transaction (R. 23, 24). He also stated that he was custodian of the records. Exhibit "3" had columns for

Name, Badge Number, time in, time out, their association and the name of the person they were to see (R. 25). The guard would log the visitors in (R. 26).

He had never had occasion to check the accuracy of the records. He did not recall the circumstances giving rise to the form they used. It was used to keep a record of visitors entering and leaving the project (R. 30). The signature of Mr. Crawford, a guard, appears on the exhibit and along side of it the abbreviation "Mon." (R. 33).

Mr. Barker was not directly concerned with the make up of the exhibit, how it was kept or whether it was accurate. He was just the custodian of the record (R. 41).

Everett E. Crawford was working as a relief guard on the Taum Sauk Project in May of 1962 (R. 46). Exhibit "3" was a visitor log on a day that he was the relief guard. The date on the log was May 9. The second sheet of the log contained his signature on the same line in his handwriting was the abbreviation Mon. (R. 52, 53). Meaning Monday. He put the day of the week on all of his sheets (R. 53, 54). May 9, 1962, was a Wednesday (R. 77).

On that log there was an entry for Mr. Wilson. For time in, it had 10:40, for time out, it had 12:30 (R. 49).

In May 1962, the union representatives were not stopped at the gate. They were waved through (R. 56, 58). If other traffic were coming through he would not enter the name and time until some time later. It could vary ten to fifteen minutes (R. 58). He had given a statement to the effect that it could be as much as two hours later (R. 61).

There was an erasure in the time out square next to Mr. Wilson's name but he could give no explanation because he could not remember that far back (R. 67, 68).

He didn't know if anyone ever checked the time sheets (R. 63).

During the direct examination of Mr. Crawford, the following occurred:

> "Q.—Mr. Gilmore: I will now offer in evidence what has been marked Government's Exhibit 3 for identification as Government's Exhibit 3.
>
> Mr. Bruntrager: I will object to it, your Honor, on the ground it has not been properly identified and a proper foundation for its introduction into evidence has not yet been laid.
>
> The Court: Overruled. It may be admitted (R. 50)."

REASONS FOR GRANTING THE WRIT.

This is a companion case to Charles Keeble, Petitioner, v. United States, No. 575 on this court's appellate docket, October Term, 1965, and in which certiorari was denied December 6, 1965.

The sole objection of the Solicitor General to the primary issue raised in that cause and which is here before this court has lost its validity as we point out hereafter.

The principal issue in the case was whether appellant lied when he testified that he was not at the roadside park and did not go to the Allen Farm between 7:30 and 8:00 o'clock in the morning of Wednesday, May 9, 1962, but that he was fifty to sixty miles away at approximately 8:00 to 8:30 o'clock on that morning.

As proof of one of the essential allegations of the indictment the Government offered and the court admitted Exhibit "3" into evidence over the objection of defendant (R. 50).

The exhibit is a visitors' log of 2 sheets purporting to show the name, the time of arrival and the time of depar-

ture of visitors to the Taum Sauk Project within a given twenty-four hour period. The exhibit is in the handwriting of Everett Crawford, a relief guard (R. 46, 52).

It contains the notation "May 9-62." At the time when he went off duty, Mr. Crawford signed his name and put down the day of the week as Monday using the abbreviation "Mon." He always put the day of the week on all of his sheets (R. 52, 54).

May 9, 1962, was in fact, a Wednesday (R. 77). Thus Monday would in fact have been May 7.

Mr. Crawford had no independent recollection of the events recorded on the log and could give no explanation as to why it contained the date as May 9, 1962, and the day as Monday (R. 62, 63, 72, 73, 78).

Mr. Barker testified that he was merely the custodian of the record; that he was not concerned with the make-up or accuracy of the exhibit. He acknowledged that the abbreviation for Monday appeared on the exhibit (R. 33). He gave no explanation and obviously could not say whether it was the log sheet for Monday or for Wednesday of the week of May 7, 1962.

In this case, unlike Keeble, supra, it was made abundantly clear that this document was clearly ambiguous.

It would seem to be perfectly obvious and elemental that before a document could ever be considered for qualification as a business record under Title 28, Section 1732, it must be shown in fact, to be the document sought to be introduced.

The only log sheet that could have any relevancy to this cause would be that of Wednesday, May 9, 1962. The statute did not ". . . do away with the requirement that the record to be admissible must carry with it some guarantee of trustworthiness." Hartzog v. U. S., 4 Cir., 217 F. 2d 706, 709.

The government, of course, treated the log in the light most favorable to it and did not even point out or try to explain the ambiguity appearing in the document prior to offering of the exhibit into evidence, although it was well aware of the discrepancy. The F. B. I. had questioned Mr. Crawford about the discrepancy before the trial (R. 50, 77, 78).

The log is in error as to the primary factual issue sought to be proved by its admission and the maker of the entry could not testify as to the correctness of each of the contradictory entries. Exhibit "3" is ambiguous. There is no evidence from which it can be said that the log is that of Wednesday, May 9, as distinguished from Monday of that week. Before it can be a business entry within the meaning of 28 U. S. C. A. 1732, it "is the invariable rule that the memorandum must be identified. A proper foundation must be laid for its introduction," Imhoff v. Richards, 48 Neb. 59, 67 N. W. 483. Having failed in this identification, the exhibit was erroneously admitted into evidence. The burden was on the Government to establish the authenticity of the memorandum. Who can possibly vouch for the correctness of an uexplained ambiguity? There is no independent proof of the day upon which this sheet was made.

There was no factual issue presented for the jury because there was no positive testimony that this was in fact the log of May 9. Thus the fact that no one can say that this is the log of May 9 goes not to the weight of the document but to its admissibility (Slip opinion p. 3).

The Circuit Court of Appeals pass over this objection by referring to its opinion in Keeble v. United States, 347 F. 2d at 953-954, in which the specific question was not presented to nor determined by the court. Due process and a fair trial should not be the responsibility alone of the trial courts. The appellate alike should face the

issues properly raised in the interest of a fair determination of causes.

The issue here raised was before the trial court which erroneously permitted the questioned exhibit to be introduced into evidence. The issue was raised in the Circuit Court of Appeals which chose to ignore it.

The only objection raised by the Solicitor General which petitioner in Keeble, supra, sought certiorari in that case, was that the matter had not been brought to the attention of the trial court. This argument as to this case has lost its validity.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

.....

HAROLD GRUENBERG,
721 Olive Street,
St. Louis, Missouri 63101,
CEntral 1-7440,
STEWART & BRUNTRAGER,

By .....
RAYMOND A. BRUNTRAGER,
721 Olive Street,
St. Louis, Missouri 63101,
MAin 1-0066,
Attorneys for Petitioner.

In the Supreme Court of the United States.

..... Term, 19..

No. .....

Woodrow Wilson, Petitioner,

v.

United States of America.

Proof of Service.

A copy of petitioner's Petition for Writ of Certiorari was served upon Thurgood Marshall, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, by placing a copy of same in the United States mail, postage prepaid, and addressed to the aforesaid at his post office address, on this .... day of January, 1966.

.....

Stewart and Bruntrager.

APPENDIX A.

Opinion.

United States Court of Appeals
For the Eighth Circuit

No. 17,917.

Woodrow Wilson, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 15, 1965.]

Before Johnsen, Vogel and Matthes, Circuit Judges.

Johnsen, Circuit Judge.

This is a companion case to **Keeble v. United States**, 8 Cir., 347 F. 2d 951. Both cases represent convictions for perjury, which had been engaged in by two local union officials, upon the same testimonial element, in a hearing before a Trial Examiner of the National Labor Relations Board, on a complaint filed by a contractor against the Union for unfair labor practices.

Keeble was secretary-treasurer of the Union, and Wilson, the present appellant, was president thereof. The convictions were had on separate indictments and trials, before different juries and trial judges. Both defendants were given a sentence of thirty months imprisonment. The judgment against Keeble has been affirmed previously, and we now affirm that against Wilson.

The complaint which was involved had been filed by a contractor named Langston, from Selma, Arkansas, in relation to a contract-operation by him of clearing the right-of-way for a power line erection near Ellington, Missouri. A crew of nonunion men had been brought in by him from Arkansas, and he had hired some others in the Ellington area. Wilson and Keeble began efforts to organize the workmen.

Early one morning, there was an assault by a group of men upon Langston's workmen at the place where the clearing activities were then being carried on. The group of assaulters had assembled at a wayside park outside of Ellington and then driven down the highway a few miles to where the workmen were. Wilson and Keeble were identified by eyewitnesses as having been at the park while the group was assembling and at the scene of the assault while it was being perpetrated. The perjury charges grew out of the testimony by each of them before the Trial Examiner that they had not been at the alleged assembling place or at the scene of the attack, but that during all of the time when these events were claimed to have occurred, they were both at the Taum Sauk project, some 50 miles away.

At the perjury trial, in addition to the direct testimony produced by the Government as to their presence at the park and at the place of assault, there was offered and received in evidence a "Visitors Log" maintained at the Taum Sauk Project, which indicated that the two of them had been admitted to the project area on that date at 10:40 a. m., which was an hour and a half or more after the time of the assault.

The principal contention urged for reversal is that it was error to permit the log to be received in evidence. The arguments made are similar to those which were before the panel which heard the **Keeble** appeal, and they

have been sufficiently considered and answered in that opinion, 347 F. 2d at 953-954. There is no need to engage in a repetition of them here. We adhere to and reaffirm the ruling there made as to the admissibility of the log and the basis on which it was predicated. As there declared, the log as maintained was sufficiently within the scope of 28 U. S. C. A. § 1732 (a) to have admissibility as a business record, and the aspects of challenge made to it are, within the language of the statute, "* * * circumstances * * * [which] may be shown to affect its weight, but * * * shall not affect its admissibility". See also **LaPorte v. United States**, 9 Cir., 300 F. 2d 878, 880, footnote 8.

The only other contention urged for reversal is that some prejudicial comments were made by the court.

In his argument to the jury, appellant's counsel called attention to the fact that the witnesses who had testified to Wilson's and Keeble's presence at the assault represented only a small number of Langston's crew of workmen. He argued that, if Wilson and Keeble had in fact been present, "these other men would have seen them". To crystallize his argument, he asked: "Where are these other fellows from Arkansas, from his home town? * * * why didn't they bring them in?"

In making reply, Government counsel stated in his closing argument: "The witnesses I have, or the witnesses that were brought before you, are the ones I have. This is what we have got". Appellant's counsel immediately interrupted:

> "Your Honor, I am going to object to that. There are these thirty other people that are purported to have seen them. There is no showing that this is all they had. This is what they brought in. And it is not fair to say that this is all they had because they had plenty more".

The court engaged in the observation that "I am quite sure it is all they have got or they would certainly have them here". Appellant's counsel thereupon made objection to the remark as not "based on any evidence" and as being "prejudicial" and requested that the jury be instructed to disregard it. The court then turned to the jury and terminated the incident with the following oral instruction:

> "Gentlemen, you have heard the testimony, and you have heard the witnesses. Remember what the lawyers say is not evidence. And remember anything the Court may say has nothing to do with what the facts are. That is for you to determine. Whether the Government could or could not have brought in other witnesses, you will remember what the testimony is in that regard".

Appellant argues that the instruction only compounded the evil of the court's initial observation, because while it told the jury that it was for them to determine the facts, the direction that "you will remember what the testimony is in that regard" implied and could only impress—as the brief puts it—that "somewhere in the testimony there was a basis for the court's statement".

A reading of the instruction in its whole leaves this as purely an artificial maze. The instruction made clear to the jury that what the lawyers said was not evidence; that anything the court said had nothing to do with what the facts were; that they had heard the testimony and the witnesses; and that it was upon this basis that they were to determine what the facts were. This general direction was then given application to the specific question of "[w]hether the Government could or could not have brought in other witnesses" by repeating the admonition in relation to it that "you will remember what the testimony is in that regard".

That such reasonably was the effect and understanding which would be conveyed by the instruction is attested by the fact that appellant's counsel so treated and accepted it both at the time and subsequently in connection with the court's charge. No challenge, claim of confusion, request for amplification, or exception was engaged in either upon the giving of the cautionary instruction or later upon the delivery of the general charge. As a matter of fact, in its general charge the court took occasion to again emphasize that it had had no intention at any time to express an opinion upon any of the facts of the situation, and that if, during the trial, the jury had gotten the impression that it was in any manner indicating "any opinion upon what is or is not a fact in this case", they were "at perfect liberty to disregard anything of the sort".

With all of this, there could be left no possible basis for a general claim of prejudicial error—much less any substance for a claim of "plain error", noticeable under Rule 52 (b) Fed. Rules of Crim. Procedure, 18 U. S. C. A., (on which any contention here would have had to be predicated in view of the lack of challenge made to either the court's cautionary instruction or its general charge).

We should perhaps add that we intend no implication on whether the court's voicing of belief that the Government had produced all the witnesses it had on the question of appellant's presence at the assault would have constituted prejudicial error if it had not made clear by its cautionary instruction or its charge that the expression was without intended significance or effect. For there to be prejudice, it would seem that the situation would in any event have had to be one in which there was such basis to view a failure to produce witnesses as having existed that appellant would upon request have been legally entitled to an instruction on the presumption which could be engaged in in this regard. Whether

the situation here was sufficiently of that character the court was not called upon to determine, nor is it before us, for no request for such a presumption instruction was made.

We have in other cases said that the rule of presumption from failure to produce witnesses is one which is to be applied with caution, **Shoenberg v. Commissioner**, 8 Cir., 302 F. 2d 416, 420; that it is not one which is abstractly entitled to be given application; but that it is to be accorded opportunity for significance and effect only when there has been shown a factual area in which it can logically operate, **Jenkins v. Bierschenk**, 8 Cir., 333 F. 2d 421, 425.

These cautions have application to requests made for an instruction. They do not, of course, prevent the court from allowing free scope for mere traditional general argument by counsel as to why some witness or witnesses have not been called to the stand. But these are matters which are not directly before us and therefore require no further discussion.

No error is shown to have been involved in appellant's trial, and the judgment of conviction is accordingly not entitled to reversal.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Crim.

Judgment.

(Filed Nov. 15, 1965.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,917. September Term, 1965.

Woodrow Wilson,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, Woodrow Wilson, do surrender himself to the custody of the United States

Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

November 15, 1965.

Order entered in accordance with Opinion:—

Robert Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.